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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOHN ZIMMERMANN,
Petitioner,

v.

BOARD OF PROFESSIONAL RESPONSIBILITY,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Tennessee

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BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the First Amendment is violated by DR 7-107, as applied in imposing a private reprimand upon a prosecutor for revealing to the press, during two separate felony trials, matters that were not in the public record, when the state court determined that, on each occasion:

(i) his statements posed a "reasonable likelihood" of interfering with a fair trial or with the imposition of sentence, and

(ii) this "reasonable likelihood" test was the equivalent of tests which require a "serious or imminent threat" or a "clear and present danger."

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BRIEF IN OPPOSITION

The Board of Professional Responsibility of the Supreme Court of Tennessee ("the Board"), the Respondent, respectfully submits this brief in opposition to the petition for writ of certiorari to the Supreme Court of Tennessee that was filed on April 20, 1989 by John Zimmermann, the Petitioner.

STATEMENT OF THE CASE

The Petitioner, John Zimmermann, is an Assistant District Attorney. He was disciplined by a private reprimand for two separate violations of Disciplinary Rule 7-107 of the Tennessee Code of Professional Responsibility.

The first violation occurred after the preliminary hearing and before jury selection in the murder trial of Larry

Sheffield. Mr. Zimmermann revealed to news reporters some gruesome details of the victim's injuries, which were not matters of public record.

The second violation occurred before sentencing in the trial of Dwayne Haynes and Richard Emmett for a number of violent felonies. Mr. Zimmermann revealed to news reporters his opinion about the seriousness of the crimes and his intention to ask for the maximum sentence.

The public defender filed complaints with the Board of Professional Responsibility about both of these incidents. A three-lawyer Hearing Panel found that Zimmermann's statements in the Sheffield case violated DR 7-107, but that his statements in the Haynes/Emmett case did not. The Panel recommended a private reprimand.

Zimmermann appealed to the Chancery Court, which conducted a trial *de novo*. The court found that Zimmermann violated DR 7-107, both in the Sheffield case and in the Haynes/Emmett case. The court affirmed the imposition of a private reprimand.

Zimmermann appealed to the Tennessee Supreme Court. The court affirmed by a vote of 4 to 1.

REASONS WHY PETITION SHOULD BE DENIED

This case is not appropriate for review by this Court, for the following reasons.

I. The Petition Attempts To Relitigate, In This Court, A Question Of State Law Concerning The Definition Of "Public Records."

The petition asserts that Mr. Zimmermann's statements consisted of information that was already available to the public. Pet., pp. i, 10. By raising the "public records" issue in this Court, Zimmermann evidently proposes to relitigate the issue here. That issue is, however, a matter of state law which has already been determined

by the Tennessee Supreme Court. It is not an appropriate issue for this Court to review.

The "public records" issue was litigated in all three tribunals that considered this case. In each tribunal, Zimmermann asserted that his statements were permitted by DR 7-107(C), which allows attorneys to quote from "public records of the court in the case." Zimmermann based this defense on his private viewing of a handwritten draft of the autopsy report in the Sheffield case, before the report had been finalized or lodged with a public records custodian.

In each tribunal the Board argued, to the contrary, that the "record" in question was not a "public record of the court in the case" at the time Zimmermann revealed its contents to the news media. Each tribunal found that Zimmermann's statements violated DR 7-107. These findings necessarily reject Zimmermann's "public records" defense. The "public records" issue is a matter of state law that has been fully litigated and authoritatively determined in the state courts. It is unsuited for review by this Court.

II. The Petition Attempts To Litigate, In This Court, An Issue That Was Expressed Only As Dictum In The Tennessee Supreme Court's Opinion.

The petition challenges the suggestion, in the majority opinion of the Tennessee Supreme Court, that the District Attorney review his "open policy with the media." Pet., pp. 24-25, referring to Tennessee Supreme Court Opinion, Pet., pp. 7a, 20a.

This portion of the court's opinion is clearly *dictum*. The District Attorney, an elected public officer, is Mr. Zimmermann's employer and supervisor. The District Attorney was not a party to this litigation and is clearly not bound by the court's *dictum* in this case. The *dictum* addressed to the District Attorney by the state court is not appropriate for review by this Court.

III. The Tennessee Supreme Court Was Unanimous In Its Rejection Of The Constitutional Challenge Raised Here.

The four Justices who joined the majority opinion of the Tennessee Supreme Court clearly rejected Mr. Zimmermann's challenge to the constitutionality of DR 7-107 as applied in this case.

The remaining member of the court, Justice Drowota, wrote a separate opinion, concurring in part and dissenting in part. Justice Drowota concurred in the majority's holding that DR 7-107, as applied in this case, does not violate the United States or Tennessee Constitution. Pet., p. 14a. The petition is clearly wrong in asserting that Justice Drowota found DR 7-107 unconstitutional. Pet., p. 13. In fact, the Tennessee Supreme Court was unanimous in rejecting Zimmermann's constitutional challenge to DR 7-107 as applied in this case.

Justice Drowota's dissent was based, not on constitutional grounds, but on his conclusion that Zimmermann had not violated DR 7-107. Pet., p. 14a. In reaching this conclusion, Justice Drowota gave DR 7-107 a more permissive interpretation than did the majority. Justice Drowota's opinion also implies that he was influenced by Zimmermann's "public records" defense. Pet., p. 17a. The division of the court on these issues is purely a matter of state law, presenting no federal question for this Court to review.

Justice Drowota's dissent also took issue with the suggestion included in the majority opinion, to the effect that the District Attorney should review his "open policy with the media." Pet., pp. 14a, 20a. As indicated above, the majority's suggestion on this matter is merely *dictum*. Consequently, the court's division on this matter presents no federal question for this Court to review.

IV. The Tennessee Supreme Court's Decision Is Correct On The Merits Of The Constitutional Issue.

The Tennessee Supreme Court correctly held that DR 7-107 is constitutional, as applied to the facts of this case. The court found that Mr. Zimmermann's statements posed a "reasonable likelihood" of interfering with a fair trial in the Sheffield case, and with the imposition of sentence in the Haynes/Emmett case. Pet., p. 12a.

Some courts perceive a constitutionally significant difference between this test and other formulations, such as "serious and imminent threat" or "clear and present danger." See, for example, the conflict on this issue between *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976) ("serious and imminent threat") and *Hirschkop v. Snead*, 594 F.2d 356 (4th Cir. 1979) ("reasonable likelihood"), both discussed later in this brief. Other courts have concluded that the distinction is merely semantic. See *In re Lasswell*, 296 Or. 121, 673 P.2d 855 (1983); *Markfield v. Association of Bar of City of New York*, 49 A.D.2d 516, 370 N.Y.S.2d 82 (N.Y. App. Div.), *app. dismissed* 37 N.Y.2d 794, 337 N.E.2d 612 (N.Y. 1975); Note, *A Constitutional Assessment of Court Rules Restricting Lawyer Comment on Pending Litigation*, 65 Cornell L. Rev. 1106 (1980).

The Tennessee Supreme Court, in the case at bar, subscribed to the latter view, that the distinction among the various verbal formulations is merely semantic. Pet., p. 12a. Thus, by finding that Mr. Zimmermann violated DR 7-107 as interpreted by the "reasonable likelihood" test, the court necessarily found that Zimmermann violated DR 7-107 as interpreted by the other two tests as well—"serious and imminent threat" and "clear and present danger." As a result of this finding, the court's decision is constitutionally correct, so long as at least one of the three tests passes constitutional muster.

V. The Tennessee Supreme Court's Decision Does Not Directly Conflict With Other Cases.

The petition fails in its attempt to demonstrate direct conflict between the Tennessee Supreme Court's decision and other cases. The petition does not cite and the Board is not aware of any precedent, from this Court or any other, that would clearly confer First Amendment protection upon Mr. Zimmermann based on the facts found in this case. These facts are, in summary, that Mr. Zimmermann spoke to news media while he was serving as prosecuting attorney in sensational felony cases; his statements are not excused by the "public records of the court" exception; his statements were highly inflammatory; his statements (in the Sheffield case) were made before jury selection and they were made to news reporters in the county where jurors would be selected; his statements (in the Haynes/Emmett case) were made before sentencing.

Most of the cases cited in the petition deal with First Amendment issues in settings that are clearly distinguishable from this case. First, the petition cites "contempt by publication" cases in which news media were the parties. *Bridges v. California*, 314 U.S. 252 (1941); *Craig v. Harney*, 331 U.S. 367 (1947); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978); *Pennekamp v. Florida*, 328 U.S. 331 (1946). These cases, dealing with freedom of the news media, do not control the case at bar, which is a matter of attorney discipline.

The petition also cites *Wood v. Georgia*, 370 U.S. 375 (1962), arising from a contempt citation against a sheriff. Again, *Wood* does not involve attorney discipline and is therefore not relevant here.

Next, the petition relies on "gag order" cases, some arising in civil litigation, others in criminal litigation. After listing these cases, this brief will indicate why they are not directly relevant here.

The civil gag order cases cited in the petition are *Bailey v. Systems Innovation, Inc.*, 852 F.2d 93 (3d Cir. 1988) (gag order addressed to parties, not counsel); *Bernard v. Gulf Oil Co.*, 619 F.2d 459 (5th Cir. 1980), *aff'd*, 452 U.S. 89 (1981) (parties and counsel); *Kemner v. Monsanto Co.*, 112 Ill.2d 223, 492 N.E.2d 1327 (1986) (parties and counsel); *Ruggieri v. Johns-Manville Products Corp.*, 503 F. Supp. 1036 (D.R.I. 1980) (counsel); *Shadid v. Jackson*, 521 F. Supp. 85 (E.D. Tex. 1981) (counsel).

The other gag order cases cited in the petition arose in criminal litigation. *Levine v. United States District Court*, 764 F.2d 590 (9th Cir. 1985), *cert. denied*, 476 U.S. 1158 (1986) (defense counsel); *United States v. Ford*, 830 F.2d 596 (6th Cir. 1987) (defendant); *United States v. Lehder-Rivas*, 669 F. Supp. 1563 (M.D. Fla. 1987) (injunction to restrain defendant in criminal case from preparing profile of potential jurors shortly before jury selection); *United States v. Marcano-Garcia*, 456 F. Supp. 1354 (D.P.R. 1978) (defendant).

The gag order cases—whether civil or criminal—are not directly relevant here, because (i) gag orders are enforceable by the court's contempt power, (ii) they must be narrowly tailored in view of the specific circumstances of each pending case, and (iii) they often involve restraints against the news media, parties and witnesses, rather than being limited to attorneys. As a result, the standards that apply in gag order cases should not necessarily control in disciplinary proceedings against attorneys. The gag order cases that arose in civil litigation are the furthest removed from relevance here, because the litigants in those cases do not enjoy the full range of constitutional protections conferred upon defendants in criminal cases.

The petition cites *Sheppard v. Maxwell*, 384 U.S. 333 (1966) which reversed a criminal conviction, in part because of prejudicial publicity which the trial court should

have prevented. The petition asserts that *Sheppard* adopts no standard, Pet., p. 16. In fact, however, this Court expressed the "reasonable likelihood" standard in that case, 384 U.S. at 363. Further, *Sheppard* involved post-conviction relief, an issue which is distinguishable from attorney discipline. For example, *State v. Biegenwald*, 106 N.J. 13, 524 A.2d 130 (1987) held that the prosecuting attorney had seriously violated DR 7-107 in a murder trial, but that these violations had not caused enough prejudice to require a new trial. A similar result was reached in *State v. Bracy*, 145 Ariz. 520, 703 P.2d 464 (1985), *cert. denied*, 474 U.S. 1110 (1986).

The petition also cites *Committee on Legal Ethics v. Douglas*, 370 S.E.2d 325 (W. Va. 1988), a disciplinary proceeding against an attorney who was a party to a transaction being investigated by two judges in a non-trial setting. The attorney published intemperate statements together with a photograph of himself, costumed and identified as a "Rambo"-type character resisting the judges. At issue was the constitutionality, as applied to those facts, of DR 1-102(A)(5), which prohibits an attorney from engaging in "conduct prejudicial to the administration of justice." The court noted that DR 7-107 was not at issue, since that provision applies only to statements made by attorneys during trials, and the *Douglas* case arose in a non-trial setting. Accordingly, *Douglas* is readily distinguishable from the case at bar.

The petition points out the apparent conflict between the "serious and imminent threat" test announced in *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976) and the "reasonable likelihood" test approved in *Hirschkop v. Snead*, 594 F.2d 356 (4th Cir. 1979). Both cases arose on pre-enforcement review of DR 7-107, a type of review that this Court subsequently discouraged in *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423 (1982). Since neither *Chicago Council*

nor *Hirschkop* contains any factual finding, their significance as precedent is limited, and the conflict between their verbal formulations may indeed be, as the Tennessee Supreme Court held in the case at bar, "more semantical than real." Pet., p. 12a.

The remaining cases cited in the petition are relevant to some extent, but they completely fail to demonstrate the direct conflict claimed by petitioner. *In re Lasswell*, 296 Or. 121, 673 P.2d 855 (1983) arose from a prosecutor's statements to the press concerning a pending criminal matter. The court formulated its own test, based to a considerable extent upon the Oregon constitutional guarantee of free speech. The court equated this test with both the "reasonable likelihood" test and the "serious and imminent threat" test and found that, under any of these tests, the prosecutor had not committed a violation.

In re Keller, 213 Mont. 196, 693 P.2d 1211 (1984) arose from out-of-court statements by counsel for the defendant in a criminal case. The court declined to enforce DR 7-107. The court was at the same time considering whether to revise its disciplinary rules by adopting the Model Rules of Professional Conduct. Within a few months after deciding *Keller*, the same court adopted the Model Rules, including Rule 3.6 which prohibits an attorney from making an out-of-court statement creating a "substantial likelihood of material prejudice." *Two More States Adopt Versions of the Model Rules: Montana*, 1 ABA/BNA Lawyer's Manual on Professional Conduct 855 (July 10, 1985). The combined impact of *Keller* and the same court's new rule creates no conflict with the Tennessee Supreme Court's opinion.

The petition cites *In re Rachmiel*, 90 N.J. 646, 449 A.2d 505 (1982). The Tennessee Supreme Court noted that *Rachmiel* presented "strikingly similar circumstances" to the case at bar. Pet., p. 8a. *Rachmiel* involved out-of-court statements by a former prosecutor. The New Jer-

sey court, applying the "reasonable likelihood" test, found the statements improper but withheld sanctions, partly because of some uncertainty as to whether the attorney was "associated" with the prosecution of the case, and partly because of the lack of precedent.

Markfield v. Association of Bar of City of New York, 49 A.D.2d 516, 370 N.Y.S.2d 82 (N.Y. App. Div.), *app. dismissed*, 37 N.Y.2d 794, 337 N.E.2d 612 (1975), also cited in the petition, arose from statements made by counsel in a criminal case, as a participant in a radio panel program on prison rebellions. Observing that DR 7-107(D) would pass constitutional muster under either the "reasonable likelihood" or the "clear and present danger" test, the court held that the attorney had not violated the rule.

The above analysis of all cases cited in the petition demonstrates no direct conflict with the decision of the Tennessee Supreme Court.

CONCLUSION

For these reasons, the Court should deny the petition for writ of certiorari.

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